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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

HOLYWELL CORPORATION, *et al.*,
Petitioners
v.
FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, *et al.*

UNITED STATES OF AMERICA,
Petitioner
v.
FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, *et al.*

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENT FRED STANTON SMITH, AS TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST

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68 PR

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

RULES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

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STATEMENT

The Parties

Petitioners are the United States and five debtors. The debtors are Theodore B. Gould ("Gould") and four entities controlled by him: two corporations, Holywell Corporation ("Holywell"), which is wholly owned by Gould, and Miami Center Corporation ("MCC"), a wholly owned subsidiary of Holywell; and two partnerships, Chopin As-

sociates, a partnership between Gould and MCC, and Miami Center Limited Partnership ("MCLP"), a partnership of Gould, Holywell, MCC, and certain limited partners. *See* Pet. App. 2a n.1. Holywell also had 19 nondebtor corporate subsidiaries with which it filed consolidated federal income tax returns, and Gould and Holywell were controlling partners of nine nondebtor partnerships. J.A. 30, 33-34, 37; *see also In re Holywell Corp.*, 118 Bankr. 876, 878 (S.D. Fla. 1990); Bankr. Adv. Proc. C.P. No. 1 (Adv. Proc. No. 88-0247), at 4-5.[1]

Respondents are the Bank of New York ("Bank"), which was the principal creditor of the debtors and the proponent of a chapter 11 plan of reorganization (the "Plan") that was confirmed on August 8, 1985 and became effective on October 10, 1985, and Fred Stanton Smith, a stranger to the affairs of the debtors who was appointed Trustee of the Miami Center Liquidating Trust (the "Liquidating Trustee") by the bankruptcy court pursuant to the Plan.

The Plan and Its Implementation

On August 22, 1984, the debtors, who listed more than $350 million in debts to over 400 creditors, filed simultaneous chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida. *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). Each debtor became a debtor in possession.

In December 1984 and January 1985, with the approval of the bankruptcy court, the debtors caused the sale of certain "Washington Properties." The gross proceeds from the sale, approximately $32 million, were deposited into bank accounts subject to court order. Bankr. C.P. No. 303.

[1] "Bankr. C.P." refers to the docketed court paper number in the Bankruptcy Court. "Bankr. Adv. Proc. C.P." refers to the docketed court paper number in the indicated adversary proceeding.

On February 27, 1985, the Bank filed a proposed plan of reorganization and a related disclosure statement. The centerpiece of the proposal was the prompt sale of the debtors' entire interest in a realty complex called Miami Center to the Bank pursuant to a contract attached to the proposed plan. It was anticipated that all allowed pre-petition and administrative claims, except for claims of the debtors and their affiliates, would be paid in full. *See* Pet. App. 30a; Bankr. C.P. No. 478 (Bank's Amended Consolidated Disclosure Statement), at 2. The plan did not deal with the payment of post-confirmation taxes, and the Bank's disclosure statement did not analyze the tax consequences of the proposed reorganization.[2]

The Internal Revenue Service ("IRS") was entitled by Bankruptcy Rule 2002(j) to notice of all stages of the proceedings. It had also filed proofs of federal tax claims not at issue in this case. It received notice of all pertinent matters, including the Bank's proposed plan and disclosure statement. The United States did not, however, object to the plan, or the disclosure statement, did not vote against the proposed plan, voiced no objection to confirmation, and did not appeal the order of confirmation. Pet. App. 30a; U.S. Br. 4 n.2. The debtors objected to the Bank's proposed plan primarily on grounds irrelevant to the present case, adding the one-sentence assertion that the plan would "create[] a new [tax] liability for these partners [in MCLP] of $10,560,000 of taxes,"

[2] See Pet. App. 42a *et seq.*; Bankr. C.P. No. 478.

The debtors filed five separate but virtually identical plans that also proposed using the proceeds from the sale of Miami Center to pay claims and made no provision for post-confirmation taxes. Their disclosure statements also provided no analysis of tax consequences, although two schedules to their statements made incidental references to federal taxes. *See* Bankr. C.P. No. 377, Schedule E; Bankr. C.P. No. 381, Schedule E. The bankruptcy court found (Pet. App. 29a-30a) that the debtors' plans had failed to disclose any tax liability arising from the sale of the Washington Properties or of Miami Center.

an assertion they later declined the bankruptcy court's invitation to explain.[3]

After "overwhelming" approval by the creditors, the bankruptcy court confirmed the Bank's proposed plan on August 8, 1985. Pet. App. 2a. The Plan did not, however, become effective until the expiration of a stay on October 10, 1985. The debtors thereafter unsuccessfully appealed the order of confirmation.[4]

The Plan provided for the creation of what it styled a "Liquidating Trust" and the appointment of a "Trustee." By order dated August 12, 1985, the court appointed respondent Smith, who had no prior connection with the debtors or the proceedings. Bankr. C.P. No. 916. Smith's authority to act became effective when the Order of Confirmation became effective on October 10, 1985.

The Plan called for the transfer to the Liquidating Trustee of "all property of the estates of the Debtors

[3] Bankr. C.P. No. 534 at 5 (emphasis omitted). At the hearing, in a passage misleadingly quoted by the debtors (Debtors Br. 4-5), the bankruptcy judge said he was a "babe in the woods" on tax matters and asked the *debtors'* then counsel, Mr. Kent, to provide an explanation of the "adverse tax consequences" the debtors were alleging and said he would honor a request to modify the Plan to alleviate any such consequences. Bank. Br. in Opp. B-49, B-50. The debtors made no response to the judge's plea.

[4] *Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed as moot sub nom. Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988). The debtors' statement (Debtors Br. 7 n.9) that the confirmation order was "unequivocally reversed" is false. On a separate appeal from the confirmation order, brought by parties not before this Court on a claim-subordination issue not relevant to the present case, a different district court judge reversed the confirmation order in respect of the claim-subordination issue, noting as he did so the debtors' separate general appeal of the confirmation order and stating that the appeal before him was limited to the specific issues raised. *See Olympia & York Florida Equity Corp. v. Bank of New York*, No. 85-3230-CIV-ATKINS, slip op. at 3 (S.D. Fla. Mar. 24, 1987), *aff'd*, 913 F.2d 873 (11th Cir. 1990).

within the meaning of § 541(a) of the [Bankruptcy] Code," J.A. 41, and it purported to give the Liquidating Trustee broad powers with respect to the assets delivered to him. *Id.* at 41-43. However, these assets consisted primarily of (i) cash from the sale of the Washington Properties, (ii) Miami Center, and (iii) stock interests in nondebtor affiliates, control of which has been a matter of dispute as described below. Since the Plan directed the prompt sale of Miami Center to the Bank pursuant to a contract attached to the Plan, *see id.* at 39, 40, the Trustee's actual holdings have since his first day in office consisted primarily of cash, and his real task, as understood by himself and all the parties, has been to pay claims in accordance with the detailed prescription set forth in Article VI of the Plan (*id.* at 45-47) and related schedules and the court's instructions. That is why, despite the apparent breadth of his nominal powers, the three courts below found that the Liquidating Trustee was essentially a "disbursing agent," with "ministerial" duties. Pet. App. 11a, 24a, 32a-33a.

The Trustee followed the Plan and the court's orders. He completed the sale of Miami Center on his first day in office, October 10, 1985. As required by the Plan, the property was sold to the Bank for $255,600,000; the consideration took the form of cancellation of the Bank's claim (approximately $242,000,000 including interest) plus cash (approximately $13,600,000 minus certain adjustments). Shortly thereafter, the Trustee made distributions in full payment of over 90% of allowed claims of unaffiliated creditors, including a cash distribution to the IRS. Bankr. C.P. No. 1254 (Second Report of the Liquidating Trustee). Every distribution (and every other payment) made by the Liquidating Trustee was either explicitly directed by the Plan or made pursuant to an order of the bankruptcy court. The United States did not object to any of these payments at any time before the decision of the bankruptcy court in the present proceeding.

The Separate Life of the Reorganized Debtors

The Plan "created the trust solely to pay the debtors' indebtedness in a manner specified by the plan" (Pet. App. 32a) and assumed that after confirmation the individual and corporate debtors would conduct their own affairs. It specifically directed the Liquidating Trustee to "[t]ake no action that would change the business of any of the Debtors as conducted at or prior to the filing of the [Chapter 11] petitions" (J.A. 43), and it granted the Trustee access to their records only "regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan." *Id.* at 50. Gould and the two corporate debtors, Holywell and MCC, have asserted their independence vigorously: [5]

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[5] In addition to the matters described in the text, the debtors have battled for title to and possession of various other pre-confirmation assets of the debtors and their nonbankrupt subsidiaries. For example, on January 23, 1986, the debtors filed an emergency motion for clarification of their right to the proceeds of the sale of the Washington Properties. The bankruptcy court, the district court, and the Eleventh Circuit rejected this claim (*Holywell Corp. v. Bank of New York*, No. 86-0848, slip op. (S.D. Fla. Feb. 20, 1987), *aff'd sub nom. Holywell Corp. v. Smith*, No. 87-5195, slip op. (11th Cir. Mar. 18, 1988)), and this Court denied certiorari. No. 88-80, *cert. denied*, 488 U.S. 850 (1988). (That is not the debtors' only previous visit to this Court. *See* Nos. 87-1988, *cert. denied*, 488 U.S. 823 (1988); 87-1989, *pet. for writ of mandamus denied*, 488 U.S. 814 (1988); 89-864, *cert. denied*, 110 S. Ct. 867 (1990); 89-708, *cert. denied*, 110 S. Ct. 725 (1990); 89-917, *cert. denied*, 110 S. Ct. 1119 (1990); 90-676, *cert. denied*, 111 S. Ct. 713 (1991); 90-761, *cert. denied*, 111 S. Ct. 767 (1991); 90-1551, *cert. denied*, 111 S. Ct. 2259 (1991).)

Gould also contested a determination that the Liquidating Trustee, and not he, was entitled to a sum certain arising out of a settlement with one of his most substantial pre-bankruptcy creditors. *See In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990).

In June 1989, Gould was cited for contempt for selling, over the Liquidating Trustee's objections and the bankruptcy court orders to the contrary, certain concrete pumps and related equipment that had belonged to the debtors, refusing to reveal the whereabouts of

(i) The debtors have continuously refused, despite bankruptcy court orders, to produce for the Trustee (a) any financial records of their wholly owned subsidiaries or (b) the "records of their own post-confirmation financial transactions." *In re Holywell Corp.*, 118 Bankr. at 878. The refusal to produce these records was sustained by the district court in 1990. *Id.* at 881.[6]

(ii) In 1987, Gould caused five of Holywell's wholly owned subsidaries (headed by Gould as president) *each* to file a lawsuit against respondent Smith alleging, *inter alia*, that Holywell, not the Liquidating Trustee, owned the stock of Holywell's non-debtor subsidiaries and was entitled to control them.[7] The complaint in one of these cases, *Twin Development Corp. v. Smith*, No. 87-0037 (W.D. Va.), filed on August 7, 1987, nearly two years after the order of confirmation, is set forth in full in Respondents' Supplemental Appendix attached to this brief. The complaint, verified by Gould, described the case as a "suit to quiet title" and alleged that Twin

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the proceeds, and refusing to turn the proceeds over to the Liquidating Trustee. *Gould v. Smith*, No. 89-2629-CIV-MARCUS, slip op. at 2-3 (S.D. Fla. May 17, 1991).

[6] One aspect of this proceeding was that Gould refused to account for approximately $485,000 from a settlement entered into by Holywell Telecommunications Corporation, a wholly owned subsidiary of Holywell. In 1988, the Liquidating Trustee filed an adversary proceeding to require Gould to provide such accounting. Bankr. Adv. Proc. C.P. No. 1 (Adv. Proc. No. 88-0247), at 6-7. The bankruptcy court entered default judgment for failure to produce financial records, but the district court vacated and remanded for a further evidentiary hearing, which has not been held. *In re Holywell Corp.*, 118 Bankr. 876 (S.D. Fla. 1990).

[7] *See Twin Dev. Corp. v. Smith*, No. 87-0037, slip op. (W.D. Va. Nov. 15, 1988); *Whitehall Sec. Corp. v. Smith*, No. 88-0016-C, slip op. (W.D. Va. May 3, 1990); *Orion Cleaning Servs., Inc. v. Smith*, No. 88-0022, slip op. (W.D. Va. May 3, 1990); *Orion Mechanical Servs., Inc. v. Smith*, No. 88-0021-C, slip op. (W.D. Va. May 3, 1990); *Holywell Management, Inc. v. Smith*, No. 88-0023-C, slip op. (W.D. Va. May 3, 1990).

Development and Holywell's wholly owned other nonbankrupt subsidiaries were "never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates" (R.S.A. 3a). It further alleged that "[u]nder the Bankruptcy Code, the ownership of the [subsidiaries' stock] reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985." *Id.* at 4a. It sought to enjoin respondent Smith "from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries." *Id.* at 6a.[8] The Virginia district court ultimately ruled in the Liquidating Trustee's favor on November 15, 1988 (6½ months after the bankruptcy court's ruling in the present case). Undeterred, Gould dissolved Twin effective May 16, 1990 without advising the Liquidating Trustee, seeking his consent, or accounting to him for the proceeds of dissolution.

(iii) The debtors insisted, long after the Liquidating Trustee took office, that the filing of their tax returns was their responsibility, not the Trustee's responsibility. Apparently based on advice of the debtors' accountants, Touche Ross & Co., *see* J.A. 159, Gould wrote to counsel for the Liquidating Trustee on Holywell letterhead on March 11, 1987, stating,

> Since the Miami Center Liquidating Trust is not a taxable entity, the interest earned on the funds deposited by the Liquidating Trustee . . . has been reported as taxable income in 1985. . . . The taxable interest income has been segregated to the accounts of Twin Development Corporation, Holywell Corporation, the Miami Center Limited Partnership, and myself. The interest income for 1986 will also be reported separately by each of the above taxable entities.

Id. at 161. On March 19, 1987, Edgar Schumacher, Holywell's chief financial officer, wrote to the Liquidating Trustee stating that "we believe" the Trust "does not" have a responsibility to file tax returns and stating (apparently mistakenly, since no return had then been filed) that "the Debtors, as the appropriate taxable entities, have filed tax returns including the 1985 interest income earned." *Id.* at 164-165. On April 29, 1987, the debtors' accountant, Clifford Benson of Touche Ross, wrote to the Liquidating Trustee and advised that he was preparing Holywell's 1985 and 1986 tax returns. *Id.* at 166. And on January 4, 1988, Holywell in fact filed a consolidated tax return for its fiscal year ending July 31, 1985, a return the United States now claims should have been filed by the Trustee.[9]

Proceedings Below

On December 27, 1987, the Liquidating Trustee initiated the present proceedings by filing an adversary complaint in the bankruptcy court. The complaint, which named the debtors, the Bank, and the United States, contended in relevant part that the debtors, not the Liquidating Trustee, were responsible for filing tax re-

[8] The 1987 complaint also made other allegations wholly inconsistent with petitioners' position in this Court. It alleged that the Plan "provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code)," R.S.A. 2a, that the "liquidating trustee . . . not being a Bankruptcy Trustee, is not an officer of the court," *id.* at 3a, and that a "liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations [of the complaint], is not authorized by the Bankruptcy Code." *Id.* at 4a.

[9] That Holywell return reported gain from sale of the Washington Properties. A 1985 partnership information return for Miami Center Limited Partnership was prepared by Touche Ross & Co. and filed in October 1986. That return reported the partnership's gain on sale of the Miami Center and in attached K-1s reported the share of income, credits and deductions of each partner, including Gould, Holywell and MCC.

turns for post-confirmation periods and paying any tax due.[10]

At trial, the debtors and the United States both unequivocally conceded that the "Liquidating Trust is not a taxable entity." J.A. 97, *see also id.* at 104-105. The United States proffered no testimony and no other evidence or exhibits except the Plan and contended only that the Trustee was responsible for filing returns for the debtor corporations pursuant to 26 U.S.C. § 6012(b)(3) and for Gould's bankruptcy estate under 26 U.S.C. § 6012(b)(4) and, as a result, responsible under 26 U.S.C. § 6151 for paying taxes, which were alleged to be "an expense of administration of the trust." *Id.* at 94-95. No one contended at trial or has contended at any time since that the Liquidating Trust was a trust taxable as a separate entity under Subchapter J of the Internal Revenue Code.

The debtors also conceded at trial that they were *not* contending that "Mr. Smith operates Holywell Corporation . . . . He is a non-operating trustee and a fiduciary." *Id.* at 99. The uncontroverted evidence established that the Liquidating Trustee never operated any of the debtors' businesses and that his function had been to hold a fund of money and pay allowed claims against the debtors. *Id.* at 124.

The bankruptcy court (Weaver, J., who had replaced Bankruptcy Judge Britton, who confirmed the Plan) ruled that the Liquidating Trustee had no responsibility to file federal income tax returns or pay any tax due after confirmation of the Plan. Pet. App. 28a-37a. The court

[10] Nothing in the record, and no materials in the possession of the Liquidating Trustee, enable the Trustee to compute the amount of the debtors' federal income tax liability, if any, for any relevant period. The estimate of tax liability in n.4 of the U.S. Brief is based on alleged tentative computations that are not of record in this or any other case, not judicially noticeable, and wholly unavailable to respondents. The Court should disregard this material. *Cf. Harmelin v. Michigan*, 111 S. Ct. 337 (1990).

stated that "[t]he government received copies of the competing plans and disclosure statements; had an opportunity to object and be heard on the terms proposed in the plans; and to appeal from the order of confirmation which contained no provision for payment of capital gain taxes. The government did none of these things." *Id.* at 30a. The court noted that it was "conceded by the government and the debtors [that] the trust is not a taxable entity." *Id.*

The bankruptcy court held that 26 U.S.C. § 6012(b)(3) did not apply because

> the liquidating trustee is not a trustee appointed in a case under title 11. The liquidating trustee was appointed by the court as part of a confirmed plan of reorganization and his actions are limited to the powers granted to him in the plan and the order of confirmation. The plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan.

Id. at 32a.[11] The court then found that the Liquidating Trustee is not an "assignee" or a "fiduciary" because he

> does not possess discretionary authority as to the disposition of . . . assets. The liquidating trustee is merely charged with the responsibility of identifying, quantifying and paying allowed claims through the disbursement of the trust assets in accordance with the terms of the confirmed plan. The liquidating trustee's functions are more closely analogous to

[11] The lower courts are the object of a good deal of petitioners' scorn (U.S. Br. 27-29; Debtors Br. 8-10) for having applied to respondent Smith the term "contract trustee," but the distinction between a "trustee in a case under title 11," who must be appointed *prior to* confirmation, *see* 11 U.S.C. § 1104(a) and *infra* p. 26, and a trustee appointed pursuant to a confirmed plan of reorganization to perform specified tasks *after* confirmation is recognized in the Bankruptcy Code itself, *see* 11 U.S.C. § 1123(a)(7), and is entirely valid.

those of a disbursing agent than to an assignee or fiduciary . . . .

Id. at 32a-33a.[12] The court therefore rejected the contention that Section 6012 applied to the Liquidating Trustee, and, since the only basis alleged for requiring the Liquidating Trustee to pay any tax was the responsibility of a return-filer under 26 U.S.C. § 6151, the court ruled that the Liquidating Trustee had no payment obligation. *Id.* at 37a.[13]

Petitioners challenge (U.S. Br. 29; Debtors Br. 5-6) the bankruptcy court's finding that the Liquidating Trustee's actual function was "to pay the debtors' indebtedness in a manner specified by the plan." Pet. App. 32a. They cite the boilerplate language of the Plan, which does, indeed, set forth powers of no apparent usefulness to a person whose actual function is to hold and disburse a sum of money. But the debtors conceded at trial that respondent Smith did not operate Holywell, J.A. 99, and the bankruptcy court's finding after trial was accepted by two courts on review and should not be open to dispute in this Court. *E.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Petitioners appealed to the district court and sought a stay barring the Liquidating Trustee from making any further payments to creditors. Resp. Br. in Opp. 8a-9a. A stay was initially granted and then vacated after the

[12] The court also noted that "there was no assignment of the debtors' properties except as provided in the plan." Pet. App. 32a-33a. That is, the Plan purported to transfer only the properties of the estates and not to give the Liquidating Trustee any rights in property, or income, that the debtors might generate from post-confirmation activities.

[13] The court therefore did not reach the Liquidating Trustee's contingent allegation that the Bank should be held liable for any tax payment for which he was determined to be responsible.

district court affirmed. Petitioners then sought a stay from the court of appeals, which was granted but which expired when that court, too, affirmed. *Id.* at 10a-11a. The debtors, but not the government, requested a further stay, which was denied by Justice Kennedy. *Id.* at 15a. After the expiration of the stay, the Liquidating Trustee made certain further payments to creditors pursuant to court order. *See* Bankr. C.P. Nos. 2168, 2170, 2173, 2215, 2216.

The district court affirmed the bankruptcy court in all respects. Pet. App. 17a-27a. It also rejected a claim, not renewed in this Court, that the Plan itself somehow required the Liquidating Trustee to pay the debtors' post-confirmation taxes. *Id.* at 21a-23a. The court specifically affirmed the finding that the Liquidating Trustee had "limited and essentially ministerial functions," that he was not a "trustee in a case under title 11," and that his nondiscretionary duties were "more akin to those of a disbursing agent, rather than an assignee or fiduciary." *Id.* at 23a-24a.

The Eleventh Circuit affirmed, Judge Cox dissenting. It held that the Liquidating Trustee "was not required by the provisions of a confirmed amended Plan of Reorganization . . . nor by statutory provisions to file tax returns." *Id.* at 2a. The court said, "First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan make him similar to a disbursing agent rather than an assignee or fiduciary." *Id.* at 11a-12a.

SUMMARY OF ARGUMENT

The central question in this case is whether the Liquidating Trustee is required (a) by Section 6012(b)(4) of the Internal Revenue Code to file federal income tax returns as the fiduciary of the "estate of an individual [i.e., petitioner Gould] under chapter . . . 11" or (b) by Section 6012(b)(3) to file federal income tax returns for the corporate petitioners, Holywell and MCC. The three courts below correctly held that he is not.

Section 6012(b)(4) has no possible application to this case, and nothing in the Internal Revenue Code requires the Liquidating Trustee to file on behalf of Gould or any related "estate." Section 6012(b)(4) provides for the filing of returns by fiduciaries for three types of entities: an "estate," a "trust," and an "estate of an individual under chapter 7 or 11." No "estate" is involved in this case: Gould is alive. No taxable "trust" is involved in this case: all petitioners explicitly conceded at trial that the Liquidating Trust "is not a taxable entity" (J.A. 97; *id.* at 105), and the bankruptcy court accepted this concession. Pet. App. 30a. And although there was an "estate of an individual under chapter . . . 11" between the filing of the petition and the date of confirmation of the Plan, the petitioner debtors correctly conceded that this bankruptcy estate "terminated in this case upon confirmation of the Plan of Reorganization." Br. 30 n.34. As long as that estate existed, Gould himself, as debtor in possession, was its fiduciary. The Liquidating Trustee never had any relationship to that estate, fiduciary or otherwise.

Section 6012(b)(3) imposes the obligation to file a return for a corporation on a person who has *displaced* that corporation's management. It grew out of a case, *United States v. Whitridge*, 231 U.S. 144 (1913), in which there had been an "ouster" of management, and it has been interpreted since the beginning to apply to persons who "stand[] in the place" of the corporate officers. U.S. Br. 16 (quoting Treas. Reg. 45, Art. 622 (1919)). This

Court has read the section to require "complete control" of the properties and business of the corporation, *North American Oil Consolidated v. Burnet*, 286 U.S. 417, 423 (1932), recognizing that the filing responsibility should be transferred only to a person who is in a position to file a complete return. *Id.*

In particular, Section 6012(b)(3) uses the term "trustee in a case under title 11" (the Bankruptcy Code's replacement for the old term "trustee in bankruptcy"), a term of art used consistently throughout the Bankruptcy Code and in the Internal Revenue Code to refer to a person appointed "before confirmation of a plan" (11 U.S.C. § 1104), who acts as "the representative of the estate" (11 U.S.C. § 323(a)) and "assumes control of the business [at which point] the debtor's directors are completely ousted." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352-53 (1985) (quotation and footnote omitted). The term "receiver," concededly (U.S. Pet. 16 n.12) not descriptive of the Liquidating Trustee, and the term "assignee" have been applied in the context of Section 6012(b)(3) only to persons who in fact fully succeeded to the management of the corporation's affairs.

Respondent Smith is not a "trustee in a case under title 11," does not otherwise "stand in the place" of the management of Holywell and MCC, and is not in a position to file Holywell's consolidated returns. All five debtors were debtors in possession, in effect serving as their own trustees (*see* 11 U.S.C. § 1107), until confirmation. The Liquidating Trustee was appointed after confirmation "solely to pay the debtors' indebtedness in a manner specified in the plan" (Pet. App. 32a), not to manage the debtors' post-confirmation affairs. He was neither the "representative of the estates," which terminated before his appointment, nor a surrogate for the management of the reorganized corporations, a role from which he was explicitly excluded.

The reorganized corporate debtors, whose post-confirmation returns are at issue, have their own vigorous management, which has not in any sense been displaced by the Liquidating Trustee. The Plan instructed him not to "change the business of any of the Debtors" (J.A. 43) and granted him access to their records only with regard to "objections to claims" (*id.* at 50), and he has been denied all post-confirmation records of the corporate debtors and all records of every kind of the 19 nondebtor subsidiaries that were part of Holywell's consolidated return group. See *supra* p. 7. He is not in a position in which he could responsibly file the Holywell group's consolidated post-confirmation tax returns—which is no doubt why Gould and Holywell took the position well into 1987 that they, not the Liquidating Trustee, were responsible for such filings and in 1988 actually did file the return for the year ended July 31, 1985 that the United States now says the Liquidating Trustee should have filed.

31 U.S.C. § 3713 and 28 U.S.C. § 960, which were not pressed on the courts below and are not relied on in this Court by the United States, have no bearing on the question presented. Section 3713 "does not apply to a case under title 11" (31 U.S.C. § 3713(a)(2)) whether or not a trustee is involved; this is plainly such a "case." Section 960 does not impose any federal tax filing or payment obligations of its own force. Its "obvious purpose was to negative the idea that a federal receiver or trustee could ignore [otherwise applicable] rules of law." *Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 166 (1941). The Liquidating Trustee claims no such immunity.

More generally, there is no basis for the petitioner debtors' suggestion that respondent Smith may somehow be personally liable for their taxes. With respect to 26 U.S.C. § 6151, this Court has disposed of any such contention with winged words: "Nothing in § 6151 . . . imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate."

Nicholas v. United States, 384 U.S. 678, 694 n.28 (1966). The Liquidating Trustee, who was a stranger to the debtors and to the proceedings until he was appointed pursuant to the confirmed Plan, has carried out his duties in good faith in accordance with the Plan and the bankruptcy court's orders. He is not responsible, in the slightest degree, for any inability of the debtors to pay, or the United States to collect, their taxes.

The contention of the United States that the decision below creates a "loophole" is mislabeled and without merit. This case does not concern any reduction in the amount of tax liability of any taxpayer. What the United States is really arguing is that in the unique circumstances of this case it may now have a collection problem, but that problem, if any, is of its own making: the United States failed to make any objection whatever to a Plan that called for (i) the prompt sale of the debtor's principal asset for a substantial "amount realized" for tax purposes but very little cash, and (ii) the prompt distribution of much of that cash, without any provision for post-confirmation tax payments. Those steps could have been proposed, adopted, and carried out without the use of a "Liquidating Trustee" or any other person who could conceivably have any obligations under Section 6012(b). The collection problem, if any, stems not at all from the interpretation of Section 6012(b) or the Trustee's performance: it stems from the structural components of a Plan to which the United States made no objection.

Finally, the debtors' assumption that the tax burden "should" be borne by the Liquidating Trustee rather than themselves is entirely wrong. Gain on a sale of their principal asset to their principal creditor is *their* income, and any related tax ought properly to be borne by them, not by their various creditors in the form of a reduction in the recoveries to which those creditors are entitled. The debtors' notion that their tax liabilities must necessarily have followed their assets is neither logical nor warranted by the provisions at issue.

ARGUMENT

I. SECTION 6012(b) DOES NOT REQUIRE THE LIQUIDATING TRUSTEE TO FILE FEDERAL INCOME TAX RETURNS.

Petitioners contend that Section 6012(b)(4) requires the Liquidating Trustee to file federal income tax returns of the "estate of an individual [*i.e.*, petitioner Gould] under chapter . . . 11," or in some other manner to file returns on Gould's behalf, and that Section 6012(b)(3) requires the Liquidating Trustee to file federal income tax returns for the corporate petitioners. Both contentions are wrong:

(a) The Liquidating Trustee cannot be, or have been, a "fiduciary" for the "estate of an individual" because, as petitioner debtors concede, the "estate of an individual" terminated before the Liquidating Trustee took office. There is no other basis for requiring the Liquidating Trustee to file returns relating to Gould.

(b) The Liquidating Trustee is not required by Section 6012(b)(3) to file returns for the corporate debtors, because he was not a "trustee in a case under title 11" within the meaning of that phrase as used in both the Bankruptcy Code and the Internal Revenue Code, nor (as the courts below properly found) did he "stand[] in the place of the corporate officers." U.S. Br. 16 (quoting Treas. Reg. 45, Art. 622 (1919)).

A. Section 6012(b)(4) Does Not Require the Trustee to File Federal Income Tax Returns for the "Estate of an Individual Under Chapter . . . 11" or Otherwise to File on Behalf of Gould.

Section 6012(b)(4) of the Internal Revenue Code provides as follows:

> (4) Returns of Estates and Trusts.—Returns of an estate, a trust, or an estate of an individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

This section requires fiduciaries to file returns for three categories of taxable entities: "estate[s]," "trust[s]," and "an estate of an individual under chapter 7 or 11." No "estate" is involved here: petitioner Gould is a very much alive discharged debtor. No taxable "trust" is involved here: all petitioners conceded at trial that the Liquidating Trust "is not a taxable entity" (J.A. 97; *see also id.* at 105), and the bankruptcy court accepted this concession (Pet. App. 30a).[14] Nor was there an "estate of an individual" for which the Liquidating Trustee acted in any capacity, because as petitioner debtors concede (Debtors Br. 30 n.34), this entity terminated before the Liquidating Trustee took office.

"[E]state of an individual under chapter . . . 11" is a technical tax term. As the U.S. Brief explains (at 32), "When an individual files for relief in bankruptcy court . . . a separate taxable entity, the debtor's estate, is created. 26 U.S.C. § 1398."[15] The individual debtor and

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[14] This concession was correct. If the Liquidating Trust is a trust at all, it is a grantor trust, as the bankruptcy court, Pet. App. 33a, and the district court, Pet. App. 24a-25a, ruled, since the assets of the Liquidating Trust are used to discharge legal obligations of the debtors. Treas. Reg. § 1.677(a)-1(d); *see Stockton v. United States*, 335 F. Supp. 984 (C.D. Cal. 1971); *In re Sonner*, 53 Bankr. 859 (Bankr. E.D. Va. 1985). It could also be argued that the Liquidating Trust is simply an agency arrangement and not a trust at all for federal income tax purposes, since it was not created "for the purpose of protecting or conserving [a trust *res*] for the beneficiaries under the ordinary rules applied in chancery or probate courts," Treas. Reg. § 301.7701-4(a), but for the opposite purpose of prompt distribution of the cash to creditors, *see Munger v. Commissioner*, 16 B.T.A. 168, 176 (1929) (reviewed), *acq.* VIII-2 C.B. 37, and because the Liquidating Trustee had only limited and ministerial duties. *See* Rev. Rul. 71-119, 1971-1 C.B. 163 (special master with powers to determine proofs of claims for settlement fund was not a fiduciary of a taxable trust); *In re Alan Wood Steel Co.*, 7 Bankr. 697, 701 (Bankr. E.D. Pa. 1980) (disbursing agent is not fiduciary because he lacks the powers or duties of a fiduciary).

[15] As the United States also notes, the rule is different for corporations: no new taxable entity is created (*see* 26 U.S.C. § 1399).

the estate in bankruptcy are required to file separate federal income tax returns. It is the estate (not Gould individually) whose tax returns petitioners claim should have been filed by the Liquidating Trustee. But that is wrong. Upon his bankruptcy filing in 1984, Gould became debtor in possession of his bankruptcy estate and remained such for the entire period the estate existed; for all of the time that there was a separate estate in bankruptcy, Gould himself was the "fiduciary" and was required to file its federal income tax returns (as well as his own individual returns).[16]

As petitioner debtors concede, the "'estate of an individual under Chapter 11' terminated in this case upon confirmation of the Plan of Reorganization." Debtors Br. 30 n.34.[17] Since confirmation preceded the Liquidating Trustee's appointment, there was no separate "estate" during any period in which the Liquidating Trustee served; and he plainly cannot have been a "fiduciary" for an entity that terminated before his appointment.

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[16] Section 1398 states that the tax on the estate of an individual under chapter 7 or 11 "shall be paid by the trustee." 26 U.S.C. § 1398(c). The reference is to a statutory trustee appointed under chapter 7 or 11 of the Bankruptcy Code as a representative of the estate displacing the debtor. *See* S. Rep. No. 1035, 96th Cong., 2d Sess. 30 (1980) (Bankruptcy Tax Act of 1980). *See also infra* pp. 26-27. Under 11 U.S.C. § 1107, if no statutory trustee has been appointed, the debtor in possession (as the substitute for the trustee) has that responsibility.

[17] Petitioners' concession is correct. Section 1141(b) of the Bankruptcy Code, 11 U.S.C. § 1141(b), provides that, except as otherwise provided in the plan of reorganization or the confirmation order, "the confirmation of a plan vests all of the property of the estate in the debtor." It is settled law that application of section 1141(b) terminates the "estate of the debtor." *E.g., Abbott v. Blackwelder Furniture Co.*, 33 Bankr. 399, 402 (W.D.N.C. 1983); *In re Westholt Mfg. Inc.*, 20 Bankr. 368 (Bankr. D. Kan. 1982), *aff'd sub nom. United States v. Redmond*, 36 Bankr. 932, 934 (D. Kan. 1984). Such a termination occurs regardless of the extent to which property is returned to the debtor. *In re Sonner*, 53 Bankr. at 864.

Petitioner debtors seek to circumvent what Section 6012(b)(4) actually says by first asserting, without citation, that "the clear purpose of the statute is to bring within its scope all situations where persons control substantially all of the assets of another" (Debtors Br. 30 n.34) and then arguing that the Liquidating Trustee should not be "permitted to escape that broad purpose because he was appointed after administration of the estate terminated." *Id.* But Section 6012(b)(4) makes no reference to control of assets and has no such "broad purpose." [18] Neither Section 6012(b)(4) nor any other applicable section shifts the responsibility for filing returns for an *individual* to another person on account of control of assets.[19] Section 6012(b)(4) sets forth specific return filing requirements for three types of taxable entities, none of which existed when or after the Liquidating Trustee was appointed.[20]

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[18] Petitioner debtors also contend that the Liquidating Trustee was a trustee of a "trust" for the estate of petitioner Gould. Debtors Br. 30. At best, this is an attempt to escape (sub silentio) the unqualified and repeated concession, made by Gould himself and explicitly concurred in by the United States and adopted by the bankruptcy court and unchallenged through the district court and court of appeals, that no separate taxable entity was created by the Plan. *See supra* p. 10. That concession was correct. *See supra* n.14. In any event, petitioners should not be allowed to withdraw it in their merits brief in this Court. *See Steagald v. United States*, 451 U.S. 204, 209-10 (1981) (party may lose its right to raise issues when it has acquiesced in contrary findings); *cf. Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989) (Court will not address issue not raised below).

[19] Section 6012(b)(2), which has no application here, provides that in the case of an individual under a disability, the duly authorized agent, committee, guardian, fiduciary or other person charged with the care of the person or property of the individual shall file the return, except that a receiver is not required to file a return if he has only part of the property of the individual.

[20] Contrary to the arguments in petitioners' briefs, *In re Bentley*, 916 F.2d 431 (8th Cir. 1990), and *In re Joplin*, 882 F.2d 1507 (10th Cir. 1989), both concern statutory trustees of ongoing "estates of individuals" and have no bearing on the obligations of the Liquidating Trustee here.

B. Section 6012(b)(3) Does Not Require the Trustee to File Federal Income Tax Returns for the Corporate Debtors.

Section 6012(b)(3) provides that in certain situations persons other than a corporation's own management are responsible for filing federal income tax returns "for such corporation." There are two corporate debtors involved in this case—Holywell and its wholly owned subsidiary MCC—and the issue under Section 6012(b)(3) is whether *their* corporate federal income tax returns due after October 10, 1985 should have been filed by their own management (as management contended until late in 1987) or by the Liquidating Trustee.

Although no petitioner mentions this, the first returns at issue are consolidated returns to be filed by Holywell as parent of an affiliated group of corporations. That group includes MCC, Twin (a nondebtor subsidiary that realized a substantial part of the gain on the sale of the Washington Properties), and other surviving nondebtor subsidiaries, which under Treas. Reg. § 1.1502-6(a) are severally liable for any tax due.[21] Although the Liquidating Trustee's inability to file accurate consolidated returns or reach the assets of the nondebtor subsidiaries for purposes of paying their share of the tax due is by no means the only reason why filing is not his responsibility, we note that the Liquidating Trustee has been successfully denied all financial information concerning the nondebtor subsidiaries (*see supra* p. 7), does not even know which subsidiaries must be included for which period, and has been denied access to the assets of the nondebtor subsidiaries (*see supra* n.6).

We demonstrate in point 1 that Section 6012(b)(3) transfers corporate return-filing responsibility only to persons who "stand in the place" of corporate management: the purpose of the section is to assure that corporate returns are filed by the persons in charge of the corporation's affairs and in possession of its records. We then show in point 2 that the courts below correctly concluded that the Liquidating Trustee's function was to disburse funds in payment of claims and that the facts demonstrate overwhelmingly that he never "stood in the place" of management of Holywell and MCC. In point 3 we show that an analogous statutory provision makes it clear that corporate returns should not be filed by a person who, like the Liquidating Trustee, has insufficient knowledge of the affairs of the taxpayers.

1. Section 6012(b)(3) transfers the responsibility for filing a corporation's federal income tax returns from its management to another person only where the other person "stands in the place" of management.

Since Section 13(c) of the Revenue Act of 1916, ch. 463, 39 Stat. 756, 771,[22] the first predecessor of Section

[21] In 1988, Holywell filed a consolidated return for the year ending July 31, 1985 (which the United States now claims should have been filed by the Liquidating Trustee) on behalf of itself and 20 affiliated corporations. Treas. Reg. § 1.1502-75(a)(2) provides that an affiliated group filing a consolidated return generally must file consolidated returns in subsequent years, which means that a consolidated return is also required for at least the fiscal year ending July 31, 1986. Whether the returns for later years were required to be consolidated would depend on the effect of confirmation and implementation of the Plan.

[22] Section 13(c) provided as follows:

> In cases wherein receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations . . . subject to tax imposed by this title, such receivers, trustees, or assignees shall make returns of net income as and for such corporations, . . . in the same manner and form as such organizations are hereinbefore required to make returns, and any income tax due on the basis of such returns made by receivers, trustees, or assignees shall be assessed and collected in the same manner as if assessed directly against the organizations of whose businesses or properties they have custody and control.

This provision began by referring to persons who "are operating the property or business." That phrase has been eliminated so as to make clear that there need not be an active business, *see infra* p. 30 n.28, but the section continues to apply, as that phrase made

6012(b)(3), the purpose of the section has been to transfer return-filing responsibility for a corporation to persons who *displace* corporate management. The provision was enacted in response to *United States v. Whitridge*, 231 U.S. 144 (1913), in which this Court held that receivers operating a rail system after "an ouster of corporate management," were not obliged to file corporate returns. *Id.* at 149. Congress enacted the predecessor of Section 6012(b)(3) so that in the case of such an ouster the successor to corporate management would be responsible for filing a corporate return.

Section 13(c) was followed by § 239 of the Revenue Act of 1918, ch. 18, 40 Stat. 1057, 1081, and several subsequent enactments containing virtually identical language.[23] Its meaning was made clear by Treasury interpretations beginning with the interpretation of the 1918 Act:

> Receivers, trustees in dissolution, trustees in bankruptcy, and assignees . . . *stand*[] *in the place* of the corporate officers and [are] required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control.

Treas. Reg. 45, Art. 622 (1919).

The United States implies that receivers, trustees in bankruptcy, and assignees are "deemed" to stand in the place of corporate management, U.S. Br. 16, but that puts it backwards: this Court recognized, in a case not cited by petitioners, that receivers, trustees in bankruptcy, and

abundantly clear, only to persons who are in charge of the corporation's affairs.

[23] *See* § 239(a) of the Revenue Acts of 1921, ch. 136, 42 Stat. 227, 259; 1924, ch. 234, 43 Stat. 253, 287; 1926, ch. 27, 44 Stat. 9, 45; § 52(a) of the Revenue Acts of 1928, ch. 852, 45 Stat. 791, 808; 1932, ch. 209, 47 Stat. 169, 188; § 52 of the Revenue Acts of 1934, ch. 277, 48 Stat. 680, 697; 1936, ch. 690, 49 Stat. 1648, 1670; 1938, ch. 289, 52 Stat. 447, 476-77; § 52(a) of the Internal Revenue Code of 1939, ch. 2, 53 Stat. 1, 27-28.

assignees have return-filing obligations *because* (and only when) they, in fact, stand in management's shoes. In *North American Oil Consolidated v. Burnet*, 286 U.S. 417 (1932), the Court, speaking through Justice Brandeis, held that Section 13(c) of the Revenue Act of 1916 did not apply to a receiver who held oil property pending litigation concerning title. The Court explained as follows:

> The language of the section contemplates a *substitution* of the receiver for the corporation; and there can be such substitution only when the receiver is in *complete control* of the properties and business of the corporation.

286 U.S. at 423 (emphasis added).

The reason for requiring "complete control" is, of course, that the purpose of Section 6012(b)(3) is not to obtain information about particular items of income but to provide for the filing of a complete corporate income tax return for a particular period, reflecting all items of income and deduction (including carryforwards and carrybacks from other periods) of the corporation itself and of any consolidated subsidiaries, and what the filer needs is "hands-on" control of corporate records and corporate affairs. This is precisely the Court's explanation of the "complete control" requirement in *North American Oil*:

> [T]here is no provision for the consolidation of the return of a receiver of part of a corporation's property or business with the return of the corporation itself. It may not be assumed that Congress intended to require the filing of two separate returns for the same year, each covering only a part of the corporate income, without making provision for consolidation so that the tax could be based upon the income as a whole.

Id. The three statutory terms—"trustee in a case under title 11," "receiver" and "assignee"—have always referred only to persons who, unlike the Liquidating Trustee here, have *displaced* corporate management and have the "complete control" of the properties and business of a corporation needed to file accurate returns.

Trustees. "Trustee in a case under title 11" is a term of art in both the Bankruptcy Code and the Internal Revenue Code. It refers to a person appointed, under one of several specific provisions of the Bankruptcy Code, prior to confirmation of a plan or discharge, to stand in the shoes of the debtor. Section 321 prescribes eligibility requirements for service, and Section 322(a) prescribes how "a person selected under section 701, 702, 703, 1104, 1163, 1302, or 1202 of this title to serve as trustee in a case under this title" qualifies to serve. It is clear in context that "trustee in a case under this title," as used in Section 322(a), means a person appointed under one of the listed sections to serve as trustee under one of the four chapters, 7, 11, 12 or 13.

Section 323(a) of the Bankruptcy Code says, "the trustee in a case under this title is the representative of the estate." That core description of the function of a "trustee in a case under this title" has no sensible application to the Liquidating Trustee, who was appointed pursuant to the confirmed plan after there had ceased to be any "estate." *See supra* pp. 19-20. The description precisely fits any trustee appointed pursuant to the provisions of any of the four chapters, all of which contemplate that any appointment will be made prior to confirmation of a plan (or discharge) and that the trustee will truly assume the management of the estate. In particular, Section 1104, the section applicable to cases in chapter 11, provides for the appointment of a trustee "[a]t any time after the commencement of the case but before confirmation of a plan."

A true "trustee in a case under title 11" of course displaces corporate management and has the "complete control" described in *North American Oil.* In *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343 (1985), this Court described at length the broad powers of a trustee appointed pursuant to the Bankruptcy Code and concluded: "Congress contemplated that when a trustee is appointed, he assumes control of the business,

and the debtor's directors are 'completely ousted.' See H.R. Rep. 95-595, pp. 220-221 (1977)." *Id.* at 352-53 (footnote omitted).

It is also clear that the term "trustee in a case under title 11" was used in Section 6012(b)(3) of the Internal Revenue Code with the same meaning as it has in the Bankruptcy Code, *i.e.*, to refer to a person who, under Section 323(a) of the Bankruptcy Code, "is the representative of the estate." Indeed, prior to 1980, the term in Section 6012(b)(3) was "trustee in bankruptcy" (the term that is still used in the current Treasury regulations, Treas. Reg. § 1.6012-3(b)(4)). The modification made by the Bankruptcy Tax Act of 1980 [24] was merely a technical amendment to conform to the terminology of the new Bankruptcy Code. *See* S. Rep. No. 1035, 96th Cong., 2d Sess. 47-48 (1980).

Receivers. The United States conceded at the petition stage that it did "not intend to suggest that the liquidating trustee was appointed as a 'receiver'" noting that 11 U.S.C. § 105(b) bars a bankruptcy court from appointing a receiver in "a case under this title." U.S. Pet. 16 n.12. The term "receiver" is used in the law with a variety of meanings, but in the few cases under Section 6012(b)(3) and predecessors it has never, to our knowledge, been applied to a person who did not displace corporate management. For example, in *Pinkerton v. United States*, 170 F.2d 846 (7th Cir. 1948), a court-appointed receiver who "succeeded to and continued [the corporation's] sole business function" did not contest his status as a receiver. *Id.* at 847. In *Kavanagh v. First National Bank*, 139 F.2d 309 (6th Cir. 1943), a predecessor of Section 6012(b)(3) was applied to a receiver after the Comptroller of the Currency had placed a bank in receivership after closing the bank.[25] No case we have found

[24] Pub. L. No. 96-589, § 6(i)(5), 94 Stat. 3389, 3410 (1980).

[25] Most of petitioners' "receiver" cases did not involve Section 6012(b)(3) or its predecessors but applied the term in entirely different contexts. *See Spring Valley Water Co. v. City & County of San Francisco*, 246 U.S. 391 (1918); *Financial & Indus. Sec. Corp.*

suggests that the term "receiver" includes a person (like the Liquidating Trustee) who administers a fund for the payment of claims while regular corporate management continues to manage the corporation's business, which the fund administrator is prohibited from changing.

Assignees. In the context of Section 6012(b)(3) and predecessors, this term has always been read to apply to a person who, *like* a "trustee in a case under title 11" but outside the bankruptcy context, "stands in the place" of corporate management. Of all the cases cited by petitioners in which Section 6012(b)(3) or a predecessor statute was actually applied, many involved true trustees in bankruptcy, acting prior to confirmation or discharge as "the representative of the estate."[26] Most of the re-

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v. Commissioner, 27 B.T.A. 989 (1933) (Board of Tax Appeals without jurisdiction over case of dissolved corporation in hands of liquidating [illegible], *Banco di Napoli Agency v. Commissioner*, 1 T.C. 8 (194[illegible] [illegible] Court without jurisdiction over case of bank in hands of state superintendent of banks); *Want v. Alfred M. Best Co.*, 105 S.E. 2d 678 (S.C. 1958) (estate of insolvent decedent subject to summary assessment of tax); *Jacoby v. Bond & Mortgage Guar. Co.*, 72 F.2d 420 (2d Cir.) (court without power to interfere with state superintendent's management of corporation), *cert. denied*, 293 U.S. 619 (1934); *Tolfree v. New York Title & Mortgage Co.*, 72 F.2d 702 (2d Cir.) (same), *cert. denied*, 293 U.S. 619 (1934).

United States v. MacDonald & Eide, Inc., 670 F. Supp. 1226 (D. Del. 1987), *aff'd*, 865 F.2d 73 (3d Cir. 1989), and *State ex rel. Gibson v. American Bonding & Casualty Co.*, 281 N.W. 172 (Iowa 1938) (both cited, U.S. Br. 28 n.21) both concerned receivers for dissolved corporations, where there was no ongoing management, and in *MacDonald & Eide* the receiver was held *not* obliged to file corporate returns. *Scott v. Western Pac. R.R. Co.*, 246 F. 545 (9th Cir. 1917) (cited, Debtors Br. 26 n.28) says nothing pertinent to the application of Section 6012(b)(3).

[26] *See Nicholas v. United States*, 384 U.S. 678 (1966) (trustee in bankruptcy under Bankruptcy Act); *In re Sapphire S.S. Lines, Inc.*, 762 F.2d 13 (2d Cir. 1985) (same); *In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974) (same); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959) (same); *Security-First Nat'l Bank v. United States*, 153 F.2d 563 (9th Cir. 1946) (same); *In re Loehr*, 98 F. Supp. 402 (E.D. Wis. 1950) (same); *United States*

mainder, involving persons other than true trustees in bankruptcy, involved persons acting after the formal dissolution of a corporation, when no other person remained in a position to conduct the corporation's affairs.[27] No case

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v. Metcalf, 131 F.2d 677 (9th Cir. 1942), *cert. denied*, 318 U.S. 769 (1943) (same); *In re Knight's Mill, Inc.*, 24 Bankr. 143 (Bankr. E.D. Mich. 1982) (chapter 7 trustee). In *Nicholas* and *Sapphire*, the obligation to file returns was not at issue.

[27] *See United States v. Loo*, 248 F.2d 765 (9th Cir. 1957), *cert. denied*, 356 U.S. 928 (1958); *Tazewell Elec. Light & Power Co. v. Strother*, 84 F.2d 327 (4th Cir. 1936); *First Nat'l Bank v. United States*, 86 F.2d 938 (10th Cir. 1936); *Whitney Realty Co. v. Commissioner*, 80 F.2d 429 (6th Cir. 1935), *cert. denied*, 298 U.S. 668 (1936); *Hellebush v. Commissioner*, 65 F.2d 902 (6th Cir. 1933); *Northwest Utils. Sec. Corp. v. Helvering*, 67 F.2d 619 (8th Cir. 1933), *cert. denied*, 291 U.S. 684 (1934); *Taylor Oil & Gas Co. v. Commissioner*, 47 F.2d 108 (5th Cir.), *cert. denied*, 283 U.S. 862 (1931); *Hersloff v. United States*, 310 F.2d 947 (Ct. Cl.), *cert. denied*, 373 U.S. 923 (1963); *Smith v. Commissioner*, 26 B.T.A. 1178 (1932); *O'Sullivan Rubber Co. v. Commissioner*, 120 F.2d 845 (2d Cir. 1941).

An exception that proves the rule is *Louisville Property Co. v. Commissioner*, 140 F.2d 547, 548 (6th Cir.), *cert. denied*, 322 U.S. 755 (1944), in which the corporation had not been formally dissolved, but had been placed in receivership by court order and had then assigned its property to a trust company for the benefit of creditors and stockholders. The court noted, "[t]he corporation was not dissolved, but was kept alive solely, it is said, for the purpose of providing a register of stockholders in the event that their equity should prove of value." Conversely, in *Commissioner v. Merchants National Building Corp.*, 131 F.2d 740 (5th Cir. 1942), where a corporation transferred its securities business to a trust for liquidation but was not formally dissolved, the court ruled that the trustee was not required to file a return on behalf of the corporation, distinguishing *First National Bank, Taylor Oil & Gas Co., Northwest Utils. Sec. Corp.*, and *Hellebush* on the ground that "[t]he cases relied upon by the Commissioner were all concerned with situations where transfers of corporate assets were made as part of, or in connection with, a plan for dissolution" (131 F.2d at 740), whereas "in the case at bar the contention of the Commissioner is confronted with the unequivocal finding of the Board of Tax Appeals that dissolution of the Securities Corporation was not contemplated in May 1934 [when assets passed to the trust]." *Id.* at 741.

cited by petitioners involved anything like a person whose function was to pay claims while the management of a reorganized corporate debtor remained in place and bore the responsibility for the corporation's ongoing affairs.[28]

2. *The Liquidating Trustee did not "stand in the place" of management of the reorganized corporate debtors.*

The bankruptcy court found after trial that the "plan created the trust solely to pay the debtors' indebtedness in a manner specified by the plan," Pet. App. 32a, and two courts accepted this finding on appeal. The record overwhelmingly supports the conclusion that the Liquidating Trustee was not intended to, and did not, function as a surrogate for management of the reorganized corporate debtors. The current affairs of these corporations are not his responsibility.

The information available to the Liquidating Trustee is incomplete because he has been denied post-confirmation records of the reorganized debtors and all records relating to their nondebtor affiliates, *see supra* p. 7. But like most plans of corporate reorganization, the Plan contemplated the continued existence of the corporate debtors, and the debtors have remained in existence, made various corporate filings, continued to have their own officers (J.A. 161, 164-65), offices and employees (*id.* at 98), done battle over their pre-petition properties, *see supra* n.5, and of course retained whatever property they have accumulated since confirmation.

The Plan contemplated that the corporate debtors would continue to conduct their business without interference from the Liquidating Trustee. It provided that the Liquidating Trustee shall "[t]ake no action that would change the business of any of the Debtors as conducted at or prior to the filing of the Petitions." *Id.* at 43. The Plan assumed the continued existence of Holywell's many nondebtor subsidiaries, whose ownership has been a matter of some contention (see *supra* pp. 7-8) but whose affairs have as a practical matter been controlled by Gould and Holywell. The Plan also explicitly assumed (J.A. 50) that the debtors would retain all of their own records, subject to the Liquidating Trustee's limited right to inspect and copy records "regarding objections to claims against the estate with a view toward the prompt determination of said objections and a prompt consummation of the Plan." *Id.* The Plan said nothing at all about records of the nondebtor subsidiaries, although at least some of the subsidiaries were part of Holywell's consolidated return group for federal income tax purposes. And the Plan also requires that any surplus remaining after the payment of claims be returned to petitioner debtors, including the corporate debtors, "pro rata." *Id.* at 39, 47.

Gould and Holywell's chief financial officer, Edgar Schumacher, certainly have not acted as if the Liquidating Trustee "stood in their place." They have battled actively and successfully to deny the Liquidating Trustee access to current control of corporate records (without

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[28] In *National Metropolitan Bank v. United States*, 345 F.2d 823 (Ct. Cl. 1965), liability under Sections 6012(b)(3) and 6151 was not at issue. The court cited Section 6012(b)(3) in the course of holding that a corporation remained in existence during liquidation and could deduct local taxes paid by an assignee that expressly assumed its liabilities. *J. Ungar, Inc. v. Commissioner*, 244 F.2d 90 (2d Cir. 1957) (cited, U.S. Br. 28 n.21) concerned whether a corporation remained in existence for tax purposes and is wholly irrelevant.

Many of the cases cited by petitioners involved an issue not relevant to this case. Prior to 1954, the statute provided that only a person "operating the property or business" was required to file a return. This requirement, which was eliminated in 1954, spawned a good deal of litigation over whether the statute applied at all in a liquidation context where there was *no active "operation." See In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3d Cir. 1974), and *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959). Respondent Smith does not contend that there is any current statutory requirement of an active business or that there was no current active business here. He contends that Section 6012(b)(3) has always referred to a person currently in charge of a corporation's affairs and that, with respect to the reorganized debtors, he plainly is not such a person.

which, as a practical matter, consolidated tax returns for Holywell and its subsidiaries cannot be prepared). *See supra* p. 7. They contended, until well after the bankruptcy court's decision in this case, that Holywell's nondebtor subsidiaries reverted to Holywell upon confirmation of the Plan and were wholly outside the reach of the Liquidating Trustee. And they insisted well into 1987, long after the Liquidating Trustee took office, that they and not he were responsible for filing the federal corporate income tax returns of the reorganized corporate debtors, and in 1988 they in fact did file the consolidated return for the year ending July 31, 1985, demanding that respondent Smith pay the tax shown as due.[29] *See supra* p. 9.

In sum, the pertinent terms of the Plan and the post-confirmation behavior of the reorganized debtors fully support the finding below that the Liquidating Trustee was essentially a "disbursing agent" (Pet. App. 12a) with "limited and ministerial duties" (Pet. App. 11a) and our contention that he did not in any sense "stand in the place" of the managements of the reorganized corporate debtors—the taxpayers whose returns petitioners want the Liquidating Trustee to file. The parts of the Plan that dealt with the Liquidating Trust were essentially backward looking, creating a mechanism to pay these corporations' preconfirmation debts while they went about their post-confirmation affairs. Those affairs are to be reflected in the post-confirmation corporate tax returns whose filing is at issue. With respect to those affairs, as the petitioner debtors themselves vigorously insisted until recently, the Liquidating Trustee not only

[29] That demand had no basis whatever in the Internal Revenue Code provisions at issue in this case: Section 6151 provides that the person required to file the return shall pay the tax. The debtors' demand is consistent with petitioners' curious notion that anyone who holds assets of, or received from, a taxpayer is obligated to pay his taxes. There is no such "universal transferee liability" principle in the Internal Revenue Code.

lacked the "complete control" required by *North American Oil Consolidated*, he had no role at all.[30]

3. *Section 6012(b)(5) makes clear that the Liquidating Trustee should not file returns for the reorganized debtors because he does not control the pertinent information.*

Section 6012(b)(5) is instructive here. That section provides that, where Section 6012(b) applies in a situation involving joint fiduciaries (such as co-executors), the return is to be filed by a fiduciary with sufficient knowledge of the taxpayer's affairs:

> (5) *Joint fiduciaries.* Under such regulations as the Secretary may prescribe, a return made by one of two or more joint fiduciaries shall be sufficient compliance with the requirements of this section. A return made pursuant to this paragraph shall contain a statement that the fiduciary has sufficient knowledge of the affairs of the person for whom the return is made to enable him to make the return, and that the return is, to the best of his knowledge and belief, true and correct.

26 U.S.C. § 6012(b)(5). *See also* Treas. Reg. § 1.6012-3(c). The statutory provision and implementing regulation are not applicable to the present case because the Liquidating Trustee is not a "joint fiduciary": he has no fiduciary role at all with respect to the reorganized corporate debtors.

[30] We note as well that there has been no determination in this case that the Liquidating Trustee in fact had possession of or title to all or substantially all of the property or business of either corporate debtor or the nondebtor subsidiaries that must join in the consolidated returns. The date as of which such a determination is to be made is not clear but is presumably either the end of each tax year or the date on which each return is due. As of each such date, there may be issues as to (a) assets acquired by a debtor after confirmation, (b) corporate records, which are an important component of both "property" and "business," (c) the stock and net worth of the nondebtor subsidiaries, and (d) various other assets for which the debtors did battle as described in *supra* n.5.

But it is nevertheless relevant that the Liquidating Trustee could not make the required representation because, as we have shown, he had been denied knowledge of the current affairs of the debtors and their affiliates. Section 6012(b)(5) reflects, in the context of Section 6012(b)(3), the fundamental principle that tax returns are to be filed by persons who can report on the taxpayer's affairs as a whole. The only persons in a position to file for the years at issue and make the required representation were the corporate debtors' management, as demonstrated by the fact that Gould in fact signed and filed the consolidated return of Holywell for the tax year ending July 31, 1985, making the required representation of accuracy under penalties of perjury.

II. THE LIQUIDATING TRUSTEE IS NOT PERSONALLY LIABLE FOR FEDERAL INCOME TAXES OWED BY THE DEBTORS: 31 U.S.C. § 3713 AND 28 U.S.C. § 960 HAVE NO BEARING ON THE QUESTION PRESENTED IN THIS CASE.

Petitioner debtors argue that 31 U.S.C. § 3713 and 28 U.S.C. § 960 render respondent Smith personally liable for payment of the debtors' taxes. These arguments were not made to the bankruptcy court by any of the petitioners, were not discussed by any of the courts below, and are not made to this Court by the United States. They are without merit, and the debtors' attempt to inject this issue to make respondent Smith fear for his personal assets is entirely inappropriate.[31]

A. 31 U.S.C. § 3713 Has No Application to this Case, Which Is Plainly a "Case Under Title 11."

31 U.S.C. § 3713 has two subsections. Subsection (a) provides that, in certain circumstances, "[a] claim of the United States Government shall be paid first." But even if an inchoate tax liability of a kind assumed arguendo here would qualify as a "claim," Section 3713(a) has no application to this case, because paragraph (2) of this subsection says, without qualification, "This subsection does not apply to a case under title 11." Subsection (b) holds a "representative" liable for paying any part of a person's debt ahead of "a claim of the Government," but this subsection contains a corresponding exception for "a trustee acting under title 11."

This is plainly a "*case* under title 11." The jurisdiction of the district court over the bankruptcy proceeding is based on 28 U.S.C. § 1334(a), conferring jurisdiction over "all cases under title 11." The power of the bankruptcy court to, among other things, confirm the Plan, appoint the Liquidating Trustee, order the transfer of assets to the Liquidating Trustee, and direct payments by the Liquidating Trustee pursuant to the Plan is based on the power of bankruptcy judges under 28 U.S.C. § 157(b)(1) to "hear and determine all cases under title 11." As the Government points out (U.S. Pet. 14 n.10; U.S. Br. 21 n.15), insofar as this is a declaratory judgment proceeding "with respect to Federal taxes," 28 U.S.C. § 2201 would bar the proceeding if it were not

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[31] Even if, contrary to our argument in Part I, Sections 6012 (b)(4) and (b)(3) are applicable in this case, no party contends that respondent Smith would have any liability under 26 U.S.C. § 6151 beyond the assets remaining in his hands in his official capacity. This Court has resolved any such question: "Nothing in § 6151 of the Internal Revenue Code . . . which obliges the person required to file a return to pay the tax in question, imposes any obligation on the trustee other than in his capacity as the representative of the bankrupt estate." *Nicholas v. United States*, 384 U.S. at 694 n.28.

No one would agree to serve as "trustee in a case under title 11" if, merely by accepting the responsibility to file returns, he or she were exposing personal assets to liability for the bankrupt's taxes that the bankrupt's assets are insufficient to pay. When Congress intends to impose personal liability for the payment of taxes on a person acting in a specified capacity, it does so explicitly. *See* 26 U.S.C. §§ 2032A(c) (qualified heir "personally liable" for additional estate tax in certain circumstances); 3505 (under certain circumstances, lender "liable in his own person and estate" for taxes required to be deducted and withheld from wages); 6324 (a)(2) (specified transferees, including trustees, "personally liable" for unpaid estate tax); and 6332(d) (person failing to honor IRS levy becomes "liable in his own person and estate").

"a proceeding under section 505 or 1146 of title 11." Perhaps most important, it is the proceedings under title 11 that led to the Plan, the ranking of claims set forth therein, and the bankruptcy court's orders to the Liquidating Trustee as to whom to pay.

The petitioner debtors argue (Debtors Br. 31-33) that if respondent Smith is not a "trustee in a case under title 11" for purposes of 26 U.S.C. § 6012(b)(3), then he is not a "trustee acting under title 11" for purposes of 31 U.S.C. § 3713(b) and should be personally liable for not first paying the Government's alleged claim. This is mere sleight of hand. The relevant exception is the exception in subsection (a)(2) of Section 3713 for "a case under title 11." Since this is plainly such a *case*, there is no Section 3713(a) government priority; Section 3713(b) therefore has no application, and whether respondent Smith is a *trustee* within the meaning of Section 3713(b) is irrelevant.

Petitioner debtors' lengthy historical exegesis (Debtors Br. 31-34) does not affect the clear inapplicability of Section 3713 to this case. Sections 3713(a) and (b) are the successors to two sections, Revised Statutes of the United States of 1878 (R.S.) §§ 3466 and 3467, which were codified at 31 U.S.C. §§ 191 and 192 (1976).[32] Until 1978, these sections contained no exception for bankruptcy proceedings.[33] There were, however, troubling questions about the relationship of these sections to the

[32] Even before they were combined in a single section, the two provisions were read together. "Section 191, which establishes government priorities on any debts owed by an insolvent debtor to the United States, and § 192, which gives assurance that such debts will be paid, are part of a single statutory structure." *King v. United States*, 379 U.S. 329, 334, 336 (1964) (footnote omitted).

[33] This accounts for the application of Section 192 in *King v. United States*, which petitioner debtors misleadingly invoke (Debtors Br. 13, 23-24) in support of applying Section 3713 here. In fact, in *King*, since there was then no general bankruptcy-case exception, the petitioners "conceded the Government's priority claim under § 191." 379 U.S. at 336.

priorities specified in Section 64 of the Bankruptcy Act. *See Nicholas v. United States*, 384 U.S. at 694 n.28. In 1978, as part of the Bankruptcy Reform Act, Congress eliminated these questions, specifying that 31 U.S.C. § 191 (R.S. § 3466) did not apply to "a case under title 11 of the United States Code." Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 322, 92 Stat. 2549, 2678 (1978). Congress simultaneously made a "conforming amendment" to 31 U.S.C. § 192 (R.S. 3467), intended to negate personal liability "for non-payment of Government claims in bankruptcy cases, where the Government is not entitled to priority [under Section 191]." H.R. Rep. No. 595, 95th Cong., 1st Sess. 455 (1977); *see also* S. Rep. No. 989, 95th Cong., 2d Sess. 163-64 (1978). Finally, in 1982, Congress recodified title 31, and Sections 191 and 192 emerged as the two subsections of Section 3713. *See* Money and Finance, enactment as title 31, United States Code, Pub. L. No. 97-258, § 3713, 96 Stat. 877, 972 (1982). No substantive change was intended by this recodification. H.R. Rep. No. 651, 97th Cong., 2d Sess. 3 (1982).

Congress's explicit intent, in 1978, was to eliminate, for bankruptcy cases, all statutory priorities outside of title 11. In addition to Section 322 amending 31 U.S.C. §§ 191 and 192, title III of the Bankruptcy Reform Act contained 35 other sections amending provisions of federal law. The House Report said, "the bill, in the interest of a coherent bankruptcy policy, eliminates special priorities found in other laws and brings all priorities into the bankruptcy code itself." H.R. Rep. No. 595, 95th Cong., 1st Sess. 285 (1977); *accord* S. Rep. No. 989, 95th Cong., 2d Sess. 3 (1978). *See also* H.R. Rep. No. 595, 95th Cong., 1st Sess. 193 (1977) ("The more major priority set aside [by the Act] is the . . . Federal priority established in [Section 191]. The chorus calling for repeal of that priority in bankruptcy cases has grown in recent years.").

Despite all this, petitioner debtors argue, without meaningful citation, that the exception in § 3713 for "a

case under title 11" should be construed to apply only to those "claim[s] of the United States Government" that accrue prior to confirmation and are entitled to administrative priority. Debtors Br. 31-32. This imaginative statutory revisionism would involve major surgery on a term used consistently in titles 26, 28, and 31. Congress made clear its intention that "case under title 11" be read to include all proceedings under the direction of a bankruptcy court, whether arising before or after the confirmation of a plan. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 445 (1977) ("The jurisdiction granted under [what is now 28 U.S.C. § 1334(a) over 'cases under title 11'] is of the whole bankruptcy case."). One leading commentator summarizes as follows:

> [The] "case" referred to in section 1334(a) is the case upon which all of the proceedings which follow the filing of a petition are predicated. The filing of a petition for relief constitutes commencement of the title 11 case. From that beginning follow all of the proceedings, whether called controversies, contested matters, suits, actions or disputes, that will occur in the unfolding of the case under the Bankruptcy Code. The title 11 case ends only when it is closed under section 350(a) of title 11.

1 *Collier on Bankruptcy* ¶ 3.01(1)(c)(i), at 3-20 (15th ed. 1991). *See also In re Fortner Oilfield Servs., Inc.*, 49 Bankr. 9, 10 (Bankr. N.D. Tex. 1984) ("Jurisdiction of the Bankruptcy Court attaches upon the filing of a petition for an order for relief and continues in a Chapter 11 proceeding until the case is closed."); *In re Weathersfield Farms, Inc.*, 34 Bankr. 435, 438 (Bankr. D. Vt. 1983); *In re J.M. Fields, Inc.*, 26 Bankr. 852 (Bankr. S.D.N.Y. 1983). None of the five bankruptcy cases in which this matter arises has been closed pursuant to 11 U.S.C. § 350(a).

Finally, there is no basis for petitioner debtors' assumption that a federal claim must be entitled to either administrative priority under the Bankruptcy Code or Section 3713 priority. Congress did not say, in Section

3713, that the section should not apply to claims having administrative priority. It said that the section should not apply to "a case under title 11."

B. 28 U.S.C. § 960 Has No Bearing on this Matter.

Contrary to the suggestion of petitioner debtors (Debtors Br. 33 n.38), 28 U.S.C. § 960 does not of its own force impose any obligation to pay federal (or state) income tax. It merely makes clear that a business being operated by an officer or agent under the authority of a United States court is subject to otherwise applicable taxes. Since respondent Smith makes no claim of immunity from any otherwise applicable tax—he claims only that he was not obliged to file the debtors' returns and that he is not personally liable for any tax due—Section 960 has no bearing here.

Congress enacted the precursor to Section 960 [34] in response to a district court decision [35] holding that a business operated by a federal receiver was immune from liability for certain state taxes. The objective was to overturn that decision and level the playing field for competitors of businesses operated by federal receivers. The House Report explained as follows:

> As a consequence of [the *Howe*] decision, your committee is advised, the State of Missouri and other states having similar statutes are losing thousands of dollars of revenue per month. No good reason is perceived why a receiver should be permitted to operate under such an advantage as against his competitors not in receivership, and the States and local governments be deprived of this revenue.

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[34] *See* Act of June 18, 1934, ch. 585, 48 Stat. 993 (1934), later codified at 28 U.S.C. § 124a (1940). Section 960 was given its present form in the Act of June 25, 1948, ch. 646, 62 Stat. 927 (1948). *See* H.R. Rep. No. 2646, 79th Cong., 2d Sess. A100 (1946).

[35] *Howe v. Atlantic, Pac. & Gulf Oil Co.*, 4 F. Supp. 162 (W.D. Mo. 1933), *rev'd*, *Kansas City v. Johnson*, 70 F.2d 360 (8th Cir.), *cert. denied*, 293 U.S. 617 (1934).

H.R. Rep. No. 1138, 73d Cong., 2d Sess. 1 (1934); *see also* S. Rep. No. 1372, 73d Cong., 2d Sess. 1 (1934); 78 Cong. Rec. 6656 (1934).

Section 960 does not impose federal tax obligations outside the comprehensive provisions of the Internal Revenue Code. Its purpose, as construed by this Court, was to eliminate immunity for judicial officers. *See Palmer v. Webster & Atlas Nat'l Bank*, 312 U.S. 156, 166 (1941) (the "obvious purpose" of the precursor to section 960 "was to negative the idea that a federal receiver or trustee could ignore the rules of law of the state of operation affecting the conduct of the business committed to his charge"); *see also In re I. J. Knight Realty Corp.*, 501 F.2d at 66; *United States v. Sampsell*, 266 F.2d at 635.

Contrary to the debtors' assertions (Debtors Br. 18-19), nothing in this Court's decision in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989), stands for the proposition that Section 960 itself imposes any affirmative tax obligations. The contention in *Sierra Summit* was that a liquidating trustee was *immune* from state tax: the argument was that Section 960 eliminates immunity only as to persons "conducting any business" and therefore, by implication, this is "the sole area where the state is permitted to impose a tax of any type." *Id.* at 851 (citations omitted). The Court rejected that argument, stating that "Section 960 is not such a clear expression of an *exemption* from state taxation" (*id.* at 852 (emphasis added)), and that there is otherwise no such immunity unless Congress clearly expresses itself to that effect. The Court did not hold that Section 960 itself reaches liquidation activities that fall short of "conducting a business," *see Nicholas v. United States*, 384 U.S. at 694 n.28 (Section 960 inapplicable where trustee's activities "do not amount to the conduct of business in any meaningful sense"), or that the section ever does anything more than eliminate immunity.

Finally, the brief amici curiae filed by a number of state attorneys general misconstrues the issue before the Court. That issue is limited, in the question presented by the petitioners and by the decision below, to respondent Smith's filing and payment obligations under federal law: the Eleventh Circuit held only that Sections 6013(b)(3) and (b)(4) of the Internal Revenue Code do not apply to the Liquidating Trustee. He does not claim any intergovernmental immunity from state law obligations, and whether he has state-law filing or payment obligations is not the present issue.

C. Respondent Smith Is Not Responsible for Any Difficulty the United States May Encounter in Collecting Any Tax Owed by the Debtors

Contrary to the petitioner debtors' repeated implications, there is no basis whatever for blaming respondent Smith for any shortfall between the debtors' tax liabilities and the amount the United States can now collect. References to "infidelity to the United States" (Debtors Br. 34) are entirely out of place. Smith was a stranger to the debtors' affairs until the confirmed plan became effective on October 10, 1985. The record before this Court does not suggest that his discharge of his responsibilities since that date is subject to any relevant criticism.

To begin with, the Trustee of course bears no responsibility for the terms of the Plan. He played no role in its formulation or adoption. By contrast, the United States, a party to the bankruptcy proceedings, never objected to the Plan in any respect and did not appeal its confirmation. And petitioner debtors did not press any objection on tax grounds in the bankruptcy court and declined the bankruptcy court's explicit request for help on tax issues. *See supra* pp. 3-4.

The Trustee's lack of responsibility for the terms of the Plan is important, because any shortfall in funds to pay taxes may be traceable to the very structure of the Plan. On October 10, 1985, the Liquidating Trustee received

Miami Center, which the Plan directed him to sell to the Bank for $255,600,000, of which approximately $242,000,000 took the form of cancellation of indebtedness and only $13,600,000 minus various adjustments was received in cash. Thus, the Plan itself directed the Liquidating Trustee to sell the debtors' principal asset at a stated price of which only a small fraction was paid in cash. It could hardly be clearer that any resulting shortfall in cash available to pay taxes is not of the Liquidating Trustee's making.

The Plan also instructed the Liquidating Trustee explicitly with respect to the payment of claims. Since taking office, the Liquidating Trustee has made no payment in respect of a claim that was not directed by the Plan itself or by an order of the bankruptcy court. A cash shortfall resulting from these payments is also not the personal responsibility of the Trustee.

Finally, the debtors took the position until 1987 that the filing of tax returns was their responsibility, that returns would be prepared by their accounting firm, and that the activities of the Liquidating Trustee and his accounting firm, Arthur Andersen & Co., should be limited to supplying information. *See supra* pp. 8-9. Any adverse consequence of the failure to file returns during the period when the debtors were claiming this as their responsibility is, again, obviously not the fault of the Liquidating Trustee. When the debtors changed their position, the Liquidating Trustee filed the adversary complaint in the present case, in which three lower courts agreed that he was not responsible for filing the returns at issue. The suggestion that he may be personally responsible for the present situation is wholly without merit.[36]

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[36] *Cf. Mosser v. Darrow*, 341 U.S. 267 (1951) (reorganization trustee personally liable only for willful and intentional violations of fiduciary duty); *see also Yadkin Valley Bank & Trust Co. v. McGee*, 819 F.2d 74 (4th Cir. 1987); *In re Chicago Pac. Corp.*, 773 F.2d 909, 915 (7th Cir. 1985); *Ford Motor Credit Co. v. Weaver*, 680 F.2d 451 (6th Cir. 1982).

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE DOES NOT CREATE A TAX LOOPHOLE.

Petitioners' assertion that the inapplicability of Sections 6012(b)(4) and (b)(3) to the Liquidating Trustee creates a troubling tax loophole is incorrect. First, this case does not involve any reduction in the tax liability of any taxpayer. Second, the decision below did not deprive the United States of the ability to collect any tax due. Any collection problem the government now faces (and the record does not demonstrate any such problem) is of its own making in this case and can be avoided in future cases if the Internal Revenue Service (1) objects on a timely basis to a plan of reorganization that it believes does not make appropriate provision for payment of post-confirmation federal taxes, *or* (2) exercises powers that Congress granted in 1986 for the explicit purpose of dealing with situations like the present one.

There is no dispute in this case as to who the taxpayers are or what their tax liability is. The taxpayers are Gould, his estate (which concededly terminated before the appointment of the Liquidating Trustee), Holywell, MCC, and the nondebtor subsidiaries of Holywell that are members of its consolidated group. All agree that it is the tax returns of these taxpayers that are at issue, and the income to be shown on the returns is their income, and any tax liability is their tax liability. And the amount of tax liability required to be shown thereon, while unknown, is not at issue in this case and was not affected by the court of appeals' decision. The term "loophole"—in its usual sense of an inappropriate reduction in tax liability—has no application in this case.

What the United States is actually arguing is that the implementation of the Plan has given rise to a collection problem. In the first place, that has not been shown to be true. As we have noted (*supra*, p. 10 n.10), there is no basis in the record for estimating the amount of tax due in this complex situation. Nor has there been any show-

ing that the debtors and the nondebtor subsidiaries of Holywell (which are severally liable for consolidated return tax liabilities) will be unable to pay any income tax due.[37]

If there is a collection problem, it is not traceable to the inapplicability of Section 6012(b) but to the Government's failure to object to a plan that provided for (a) the sale of the debtors' principal asset, Miami Center, to their largest creditor, the Bank, for consideration consisting primarily of cancellation of debt (generating a large "amount realized" for tax purposes but little cash) and (b) the prompt payment of much of the available cash to creditors, without reserving monies for the payment of post-confirmation taxes. The Plan could have provided for those steps to be carried out without appointing a Liquidating Trustee or any other person even conceivably reached by section 6012(b).

The Plan was filed in a court proceeding to which the United States was a party, giving the United States an opportunity to object.[38] The United States failed to object,

[37] The debtors *should* bear whatever tax burden there may be. Gain realized on the transfer of their assets, and other income realized in connection with arrangements to pay their debts, are their income. The debtors' notion that any tax due ought to be paid by the Liquidating Trustee, reducing (prospectively or retroactively) the recovery by creditors while preserving the debtors' assets, is entirely wrong.

[38] A claim that a reorganized debtor will be left with insufficient funds to pay its post-confirmation taxes is, of course, a valid basis for objection to a plan as not feasible. *See* 11 U.S.C. § 1129(a)(11). The United States may also object to a plan under Section 1129(d) of the Bankruptcy Code, 11 U.S.C. § 1129(d), if its principal purpose is the avoidance of taxes. Indeed, Section 1129(d) places an affirmative burden on "a party in interest that is a governmental unit" to make such an objection.

Here, the United States might also have objected to the Bank's disclosure statement, on which the other creditors and the court were obviously relying, on the ground that it failed to disclose important tax consequences of the Plan. Section 1125(b) of the Bankruptcy Code, 11 U.S.C. § 1125(b), requires a disclosure state-

allowing the Plan to be voted on and approved by other creditors and confirmed by the bankruptcy court, after which the United States failed to appeal, allowing the plan to be substantially consummated, as a result of which the United States received and accepted payment of its own allowed claims. If the United States wanted to contend, as it now implicitly does, that the Plan's first step—the sale of Miami Center to the Bank in a transaction that might generate far more tax liability than cash —should not be consummated and distributions expressly required by the Plan should not be made without first providing for post-confirmation tax liability, it should have made that contention long ago.

Section 1141(a) of the Bankruptcy Code provides that a confirmed plan is binding on "any entity acquiring property under the plan, and any creditor." The United States was both a creditor in respect of its pre-petition tax claims and a recipient of property under the Plan in respect thereof, and it is well established that Section 1141(a) applies to tax claims. *E.g., In re St. Louis Freight Lines*, 45 Bankr. 546, 551-52 (Bankr. E.D. Mich. 1984) ("a party in interest—in this case the IRS—is bound by the terms of the plan when confirmed, even if the plan ultimately provides it with less than that to which it is otherwise legally entitled"). *Virgin Islands Bureau of Internal Revenue v. St. Croix Hotel Corp.*, 60 Bankr. 412, 414 (D.V.I. 1986), *aff'd sub nom. St. Croix Hotel Corp. v. Government of the Virgin Islands*, 867 F.2d 169 (3d Cir. 1989).

ment to contain "adequate information," defined in Section 1125 (a)(1) to mean "information of a kind, and in sufficient detail . . . [to] enable a hypothetical reasonable investor . . . to make an informed judgment about the plan." It is obvious, and well established, that such information includes material "tax consequences which may arise as a result of the debtors' reorganization." *Hall v. Vance*, 887 F.2d 1041, 1043 (10th Cir. 1989); *see also In re Cardinal Congregate I*, 121 Bankr. 760, 765 (Bankr. S.D. Ohio 1990); *In re Jeppson*, 66 Bankr. 269, 292 (Bankr. D. Utah 1986); *In re Malek*, 35 Bankr. 443, 444 (Bankr. E.D. Mich. 1983).

Moreover, the United States, like any other party, risks its interests by failing to assert its rights in bankruptcy proceedings. For example, in *In re International Horizons, Inc.*, 751 F.2d 1213, 1218-19 (11th Cir. 1985), the court of appeals barred the United States from amending its tax claim after the bar date, saying:

> The government had multiple opportunities to assert its claim timely; it did not. It had an opportunity to object to the disclosure statement which did not schedule corporate income taxes; it did not. It was aware that the reorganization plan described payment only of *actual* tax liabilities and that the plan would not be viable should the government reach and prevail on the merits of its tax claim. Yet it did not object to the plan either in writing or at the confirmation hearing. The bankruptcy court held that given the above behavior, the Service was estopped from asserting that a windfall would befall creditors absent the tax claims. We can find no abuse of discretion in the court's equitable consideration of the Service's reorganization posture.

(Emphasis in original.) Here, the bankruptcy court has already rejected an effort to modify the confirmed Plan to provide for additional tax payments:

> The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan, more than two and one-half years after its confirmation. A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis. Additionally, the creditors voted on the plan and received payments under the terms of the plan based upon good faith reliance induced, in part, by the inaction of the government. It is simply impracticable, and may well nigh be impossible, to unwind the substantially consummated and confirmed plan.

Pet. App. 36a-37a.

Whatever rights of collection the United States may now have, it does not have the right to remedy its own lack of diligence by distorting Sections 6012(b)(4) and (b)(3). Those sections do not require any person to file tax returns for another individual under any circumstances or for a corporation that has its own vigorous management actively directing its current affairs. And those sections certainly do not make every holder of individual or corporate assets a withholding agent. As between the United States and the Liquidating Trustee here, the Trustee was fully entitled to carry out the Plan pursuant to which he was appointed and to follow the orders of the bankruptcy court.

Finally, the United States has a resource it has wholly failed to employ for dealing with future situations like this case. For funds established after August 16, 1986, 26 U.S.C. § 468B(g) provides:

> Nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current tax. The Secretary shall prescribe regulations providing for the taxation of any such account or fund whether as a grantor trust or otherwise.[39]

Under this provision, the Treasury Department has broad authority (which it has not yet exercised[40]) to

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[39] The present provision was enacted by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 1018(f)(5), 102 Stat. 3342, 3582. It codified, with changes, Section 1807(a)(7)(D)(i) of the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, 2816.

[40] In 1990, in connection with another proposed regulation, the IRS invited public comment as to the manner and extent to which it should exercise its authority to prescribe rules under Section 468B(g). 1990-2 C.B. 805, 807.

Even if the Treasury Department had adopted regulations under Section 468B(g), they would not apply to this case because of the statutory effective date. The Liquidating Trust was established on October 10, 1985, and Section 468B(g) applies only to accounts or funds established after August 16, 1986. Pub. L. No. 100-647,

establish by regulation an appropriate regime for taxing funds, like the Liquidating Trust, that are established in a bankruptcy proceeding or otherwise for the payment of claims.[41]

§ 1019(a), 102 Stat. 3342, 3593; Pub. L. No. 99-514, § 1807(a)(7)(D)(ii), 100 Stat. 2085, 2816. This case, therefore, is at worst a relic of the pre-1986 period when there was substantial uncertainty about the tax treatment of settlement funds similar to the Liquidating Trust—an uncertainty to which Section 486B(g) was designed to respond.

[41] Regulations might, for example, provide (in contrast to the concession of all petitioners in this case) that such a fund is a separate taxable entity subject to current taxation. Such regulations might follow the model of Section 468B(b), which provides a special statutory rule for so-called "designated settlement funds" which are taxed at trust rates but for other tax purposes are treated as corporations. 26 U.S.C. § 468B(b)(5). A designated settlement fund is a fund that, *inter alia,* is established for the principal purpose of resolving and satisfying claims arising out of personal injury, death or property damage. § 468B(d)(2)(D). The tax imposed on designated settlement funds is in lieu of any other federal income taxation of income from assets in the designated settlement fund. § 468B(b)(4).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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September 1991

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

Civil Action No. [87-0037]

TWIN DEVELOPMENT CORPORATION,
Plaintiff

v.

FRED STANTON SMITH, BANK OF NEW YORK,
and IRVING WOLFF,
Defendants

COMPLAINT AND APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION

1. This is a civil action seeking declaratory, injunctive, and equitable relief, and damages. Plaintiff is a Virginia stock corporation with its principal place of business in Albemarle County, Virginia. Defendant Bank of New York is a corporation incorporated under the laws of the State of New York, with its principal place of business in the City of New York, and also doing business in Miami, Florida. Defendant Fred Stanton Smith is an individual citizen and resident of Miami, Florida. Defendant Irving Wolff is an individual citizen and resident of Miami, Florida. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00. Jurisdiction is based on 28 U.S.C. 1332.

2. Holywell Corporation, the sole record shareholder of Twin Development Corporation, also has its sole place of business in Albermarle County, Virginia.

3. On June 23, 1983, in accordance with the provisions of an assignment and security agreement, Holywell Corporation pledged to Bank of New York, as collateral for a loan by the Bank of New York to Chopin Associates and Miami Center Limited Partnership, all the shares of stock of Twin Development Corporation, as well as the shares of stock of other subsidiary corporations owned by Holywell Corporation (the "other subsidiaries"). By the terms of the agreement, Bank of New York's lien on the shares of stock of Twin Development Corporation and the other subsidiaries was to be extinguished upon the repayment of the loan.

4. Holywell Corporation subsequently transferred physical possession of the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries to Bank of New York.

5. On August 22, 1984, Holywell Corporation, Chopin Associates, Miami Center Limited Partership, Miami Center Corporation and Theodore B. Gould filed related Chapter 11 petitions for reorganization with the United States Bankruptcy Court for the Southern District of Florida.

6. On August 8, 1985, the said Bankruptcy Court confirmed a Plan of Reorganization for the filed Debtors which provided for the appointment of a liquidating trustee (not a Bankruptcy Trustee, as defined in the United States Bankruptcy Code) to convey certain improved real property in Miami, Florida, to the Bank of New York, or its nominee, for a price of $255,600,000.00; said conveyance would result in satisfaction of the Debtors' indebtedness to the Bank of New York and the extinguishing of the above-mentioned liens on the stock of Twin Development Corporation and the other subsidiaries, all of which were non-filed, solvent corporations.

7. The said Bankruptcy Court appointed Fred Stanton Smith as the liquidating trustee and appointed Irving Wolff, Esquire, as the attorney for the liquidating trustee.

8. On October 10, 1985, Fred Stanton Smith, the liquidating trustee and one of the Defendants herein, conveyed the above-mentioned real property to the nominee of the Bank of New York, resulting in satisfaction of the Debtors' indebtedness to the Bank of New York.

9. Upon the transfer of the above-mentioned Miami real property to the nominee of the Bank of New York, the Bank of New York delivered to the said Irving Wolff, then attorney for the liquidating trustee, the certificates representing all of the shares of stock of Twin Development Corporation and the other subsidiaries, inasmuch as the conveyance of the Miami real property had released the Bank of New York's lien on the said shares of stock.

10. On May 15, 1987, the aforementioned Bankruptcy Court dismissed Irving Wolff as attorney for the liquidating trustee, and appointed Herbert Stettin, Esquire, as the new attorney for the liquidating trustee Fred Stanton Smith.

11. Defendant Fred Stanton Smith now asserts, through his new attorney Herbert Stettin, that the shares of stock of Twin Development Corporation and the other non-filed subsidiaries, and, through these shares, all of the assets, real and personal, of Twin Development Corporation and the other subsidiaries—all solvent corporations that were never under the jurisdiction of the Bankruptcy Court and never part of the Debtors' bankrupt estates—are the property of the liquidating trustee, who, not being a Bankruptcy Trustee, is not an officer of the court.

12. Defendant Fred Stanton Smith, through his new attorney Herbert Stettin, threatens to act by voting the shares of stock of Twin Development corporation and the other subsidiaries so as to create new Boards of Directors

which will authorize the liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds from such liquidations into the liquidating trust controlled by Defendant Smith.

13. Under the Bankruptcy Code, the ownership of the stock of Twin Development Corporation and the other subsidiaries reverted to Holywell Corporation, outside the jurisdiction of the Bankruptcy Court, upon confirmation of the Plan of Reorganization entered on August 8, 1985.

14. Defendant Bank of New York wrongfully transferred the certificates representing the shares of Twin Development Corporation and the other subsidiaries to Defendant Irving Wolff, who was then attorney for the liquidating trustee, on October 10, 1985.

15. Defendant Fred Stanton Smith now wrongfully asserts that the shares of stock of Twin Development Corporation and the other subsidiaries are the property of the liquidating trustee, and threatens to immediately vote the said shares of stock so as to cause an immediate liquidation of Twin Development Corporation and the other subsidiaries, and the transfer of the proceeds of said liquidations into an account controlled by the liquidating trustee, Defendant Smith.

16. A liquidating trustee not appointed as a Bankruptcy Trustee under 11 U.S.C. 1104, but purporting to exercise the sweeping powers reflected in the allegations herein, is not authorized by the Bankruptcy Code.

17. The actions of the Defendants as set forth above represent part and parcel of a continuous pattern of conduct in which the liquidating trustee, to the extent of the validity of his appointment (which appears to be directly contrary to the provisions of the Bankruptcy Code), has disregarded the legitimate interests of the Plaintiff and the other subsidiaries of Holywell Corporation, said entities being solvent, non-debtor corporations,

and has breached his fiduciary duty to them as beneficiares of the liquidating trust, causing substantial damage to the Plaintiff and the other subsidiaries. The said conduct of the Trustee has included, without limitation:

a. Failure and refusal to establish any reserve for the repayment to plaintiff of a super-priority loan approved by and ordered by the Bankruptcy Court to be paid with priority over all other creditors.

b. Failure and refusal to establish any reserve for the satisfaction of income tax liabilities of Plaintiff and the other non-debtor subsidiaries of Holywell Corporation, incurred as a result of the sale of assets of Plaintiff and the other non-debtor subsidiaries, a significant portion of the proceeds from such sales currently being in the possession of the liquidating trustee.

18. The wrongful actions of Defendant Bank of New York and Defendant Fred Stanton Smith, and the immediately threatened actions of Defendant Smith will, if unchecked, cause immediate irreparable harm to Plaintiff Twin Development Corporation, for which there is no immediately available adequate remedy at law.

WHEREFORE, Plaintiff Twin Development Corporation prays for the following:

1. A hearing on the corporation's application for a preliminary injunction enjoining Defendants Bank of New York, Irving Wolff, and Fred Stanton Smith from taking any action whatsoever with respect to the said shares of stock and/or assets of Twin Development Corporation or the other subsidiaries, and particularly enjoining Defendant Fred Stanton Smith from any efforts to assert his claimed right to vote the shares of stock of Twin Development Corporation or the other subsidiaries in any fashion whatsoever, pending trial of this matter.

2. Judgment requiring Defendant Irving Wolff or any successor holder to deliver to the lawful officers of the Plaintiff all certificates representing the shares of stock in Twin Development Corporation and the other subsidiaries now wrongfully held by him, and a permanent injunction forever enjoining Defendants, or any of them, from asserting any right or claim to the stock or assets of Twin Development Corporation or the other subsidiaries, or, alternatively, a hearing, pursuant to 28 USC 2201 for a determination and declaration of the identity of the proper shareholders of Twin Development Corporation and the other subsidiaries.

3. Inasmuch as this is an action to quiet title to property whose situs is in this district, an order of this court pursuant to 28 USC 1655, directing the out-of-state Defendants named herein, namely, Bank of New York, Irving Wolff, and Fred Stanton Smith, to appear or plead in this matter by a day certain (such order to be served personally on the Defendants).

4. For damages in excess of $10,000.00.

5. And for such other and further relief as justice and equity may require.

Respectfully submitted,

TWIN DEVELOPMENT CORPORATION

By: /s/ Robert M. Musselman
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Attorneys for Plaintiffs

VERIFICATION

Theodore B. Gould, being first duly sworn, deposes and says:

I am the President of Twin Development Corporation, the Plaintiff herein; I have read the contents of this Complaint, including the request for Preliminary Injunction, Permanent Injunction, and Declaratory Relief, and belief the same to be true according to the best of my knowledge, information, and belief.

/s/ Theodore B. Gould
THEODORE B. GOULD
President
Twin Development Corporation

Sworn to and Subscribed before me this 4th day of August, 1987.

/s/ Faye M. McBurney
Notary Public

My Commission Expires: June 29, 1990